(4)

No. 85-21

Supreme Court, U.S.
FILED
AUG 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENTS IN REPLY TO THE UNITED STATES AS AMICUS CURIAE

BRYCE REA, JR.
DONALD E. CROSS
REA, CROSS & AUCHINCLOSS
1 Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

SANFORD M. LITVACK
DONOVAN, LEISURE, NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Attorneys for Respondent Niagara Frontier Tariff Bureau, Inc.

DONALD L. FLEXNER *
WM. RANDOLPH SMITH
CLIFTON S. ELGARTEN
PETER K. LEVINE
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5800

Attorneys for Respondent Dominion-Consolidated Truck Lines Ltd.

[Additional Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

1988

LESTER M. BRIDGEMAN
LOUIS E. EMERY
BRIDGEMAN & URBANCZYK
1112 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 429-9223
Attorneys for Respondent Inter-City Truck Lines (CANADA), Inc.

PETER D. STANDISH
JOEL B. HARRIS
PHILIP A. BYLER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorneys for Respondent TNT Canada, Inc.

PETER A. GREENE
CHARLES L. FREED
THOMPSON, HINE AND FLORY
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800
Attorneys for Respondent ICL International Carriers, Ltd.

JOHN W. BRYANT
EAMES, WILCOX, MASTEJ & BRYANT
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750
Attorneys for Respondent Bondy Cartage, Ltd.

* Counsel of Record

August 14, 1985

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases	Page
Georgia v. Pennsylvania Railroad, 324 U.S. 439 (1945)	*passim*
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	2
ICC v. American Trucking Associations, Inc., 104 S. Ct. 2458 (1984)	3, 5
In re Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed*, No. 85-112	3
Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922)	*passim*
Minsky v. Auto Driveaway, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984)	3
Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)	2
Patsy v. Board of Regents, 457 U.S. 496 (1982)	3, 4
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347 (2d Cir. 1985)	2, 5
United States v. Auto Driveaway Co., 1981-2 Trade Cas. (CCH) ¶ 64,380 (D.D.C. 1981)	3
Statute and Legislative Materials	
Motor Carrier Act of 1980, 49 U.S.C. § 10706 (b) (3) (D) (1982)	4
131 Cong. Rec. E3801 (daily ed. Aug. 1, 1985)	5
Miscellaneous	
Brief for the United States and the FERC as Amici Curiae, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981)	2
Reply Brief for the Petitioners, *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984)	5
Traffic World, Aug. 12, 1985	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENTS IN REPLY TO THE UNITED STATES AS AMICUS CURIAE [1]

The United States, as amicus curiae, argues that this Court should reconsider the issue settled in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), and *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945). Brief for the United States as Amicus Curiae at 6 ("Amicus Brief").

1. Amicus does not argue that the Court misconstrued the relevant statutes or misperceived the intent of Congress when *Keogh* and *Georgia* were decided. Nor does Amicus dispute that *Keogh* is settled law that has been

---

[1] Respondents' Rule 28.1 information is included as Appendix A to the Opposition Brief.

applied by the courts with consistency over the past 60 years and never overruled by Congress despite numerous opportunities. Rather, it contends that the *Keogh/Georgia* holdings lack congruence with contemporary regulatory and judicial philosophies.[2]

In advancing reformist arguments,[3] Amicus ignores the fundamental policy of *stare decisis*, which lends predictability and integrity to the law and ensures a proper allocation of functions between the courts and the political branches. Under that principle, the policy choices associated with Amicus' desire to recast settled law are for

[2] Particular reliance is placed upon the presumption against implied immunity, Amicus Brief at 10-14, which, as discussed in our Opposition Brief at 12-14, neither post-dates *Keogh* and *Georgia*, nor was a stranger to those cases. The government also argues that "it strains credulity" to hold, as the Second Circuit did below, that an implied immunity can exist where express immunity has been enacted by Congress. Amicus Brief at 11. However, this Court has found implied antitrust immunity even where the express immunity provisions of the statute were not applied to the conduct in question. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385 & n.14 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304, 312-13 (1963). This finding is particularly appropriate where, as here, the implied immunity antedated the express immunity, and Congress stated its intent to preserve that implied immunity. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1359-60 (2d Cir. 1985); Opposition Brief at 9-11.

[3] The portrayal of *Keogh* as an anachronism (Amicus Brief at 17-18) is belied by the facts that (1) Congress has not seen fit to dispense with the rate regulation that underlies *Keogh*, (2) the ICC today has exactly the same powers over the motor carrier rates at issue here as it always had (*see* Opposition Brief at 15-16), and (3) the Commission reviews every general rate increase, including those proposed by Respondents. Nor does Amicus' position square with recent decisions of this Court. *See* Opposition Brief at 13 n.18. Indeed, the Solicitor General argued in one of those cases that rates filed with a regulatory agency are inviolate in a civil damage action, and this Court accepted the proposition. Brief for the United States and the FERC as Amici Curiae at 8, 10, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

Congress, not the courts. *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496 (1982).[4] For example:

a. If there is to be a treble damage penalty for rate bureau infractions, should such sanction apply equally to the entire range of non-immune rate bureau activity, from substantial, intentional misdeeds (such as those prosecuted criminally in *Minsky*) to technical violations (such as the one on which the ICC refused to base a damage award in *Wheat Rail*)?[5]

b. Under *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458, 2466-68 (1984), the ICC must determine whether and to what extent the rate bureau agreement approved by the Commission has been violated and, if so, whether such violation is significant or trivial and whether damages are appropriate. Congress might well reject the application of antitrust rules that disregard the regulatory agency's primacy in this area.

c. The government suggests blithely that improper speculation by juries as to how the ICC would decide the hypothetical rate issue in antitrust damage actions may be reduced by referring the question to the Commission, but never explains how such a system would work. Amicus Brief at

[4] In *Patsy*, this Court granted *certiorari* because the lower court ignored *stare decisis*. The Court held that policy considerations warranting changes in statutory remedies are matters for Congress, and reversed the lower court. 457 U.S. at 512-15; *id.* at 516-17 (O'Connor, J., concurring); *id.* at 517 (White, J., concurring) ("whether or not this initially was a wise choice, [prior] decisions are *stare decisis*").

[5] *See Minsky v. Auto Driveaway*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984); *United States v. Auto Driveaway Co.* 1981-2 Trade Cas. (CCH) ¶ 64,380 (D.D.C. 1981); *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed*, No. 85-112; *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458, 2468 n.13 (1984).

8. At present, there is no statute that permits this type of referral, no judicial decisions that authorize referral of hypothetical questions concerning *non-existent* rates, and no framework for determining how the reference procedure would be integrated into an ongoing jury trial.

d. Congress may well wish to mitigate the potentially harsh consequences of expanding treble damage exposure through the use of a phase-in period or other transition measures, as it has done in virtually every "deregulation" statute cited by the government.[6]

Resolution of these policy issues requires the type of political compromise, balancing and fine-tuning that are the traditional functions of the legislative branch, for sound reasons. As the Court noted in *Patsy*: "These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary . . . ." 457 U.S. at 514.

2. If after the passage of 60 years the Government now wants to change settled law, the executive branch enjoys ready access to Congress for that purpose. In the past decade, representatives of the Department of Justice, the Department of Transportation and the ICC have actively participated in the political process that produced five amendments to the Interstate Commerce Act. As part of that process, these representatives presented their policy views to Congress on no fewer than 114 occasions. *See* Appendix. Yet not one of these officials has ever asked Congress to overrule the *Keogh* doctrine, which the Government here argues is an issue of "substantial importance to the economy." Amicus Brief at 18

[6] For example, the Motor Carrier Act of 1980 reduced the scope of antitrust immunity for collective ratemaking effective four years from the date of the Act. 49 U.S.C. § 10706(b)(3)(D) (1982).

n.21.[7] Be that as it may, the executive branch remains free today to seek any such changes from the legislature.[8]

3. The Government acknowledges, as it must, that *Keogh* does not curtail the law enforcement authority of the United States, but nevertheless seeks to justify *certiorari* on the ground that the vigilance of shippers in policing rate bureau compliance, if coupled with the right to sue for antitrust damages, would be of "importance to the economy." Amicus Brief at 18 & n.21. Just last year, in *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984), the United States argued to this Court precisely the opposite—that because of *Keogh* and its restriction on treble damages recovery, the ICC required broad power to nullify rates retroactively, and to award shippers damages under the Interstate Commerce Act for rate bureau violations. Reply Brief for the Petitioners at 4-5, *ATA*; *see* 760 F.2d at 1364 n.12. Now that the Court has accepted the Government's position that the Motor Carrier Act of 1980 contemplated a shipper remedy for illegal ratemaking that is potentially "ruinous" to carriers and even more harsh than antitrust damages, 104 S. Ct. at 2467, there can be no credibility in the claim that remedies under the Interstate Commerce Act are

[7] Unlike Petitioners, the United States does not contend that Congress intended to overrule *Keogh* by the Motor Carrier Act of 1980 or the Reed-Bulwinkle Act of 1948. *See* Amicus Brief at 11 n.12.

[8] Indeed, the issues underlying the *Keogh* doctrine are currently before the Congress. Legislation was recently introduced in the House that, except as to transportation of passengers and household goods, is intended to end all ICC regulation of interstate motor carrier rates and tariffs, and eliminate ICC authority to grant antitrust immunity for motor carrier rate bureaus. *See* 131 Cong. Rec. E3801 (daily ed. Aug. 1, 1985) (statement of Rep. Moody). In the Senate, oversight hearings on the Motor Carrier Act of 1980, in which the ICC is scheduled to participate, are set for September 9, 1985. *Traffic World*, Aug. 12, 1985 at 8.

istration. Nor would the legislation change current statutory provisions requiring DOT to set financial responsibility requirements, such as insurance.

Consumers and shippers both will further benefit from removal of the last economic restrictions on trucking, Dole said, because "motor carriers will be permitted to carry whatever commodities they choose, over whatever routes they choose, at whatever rates are mutually agreeable to them and to their customers." She added that numerous studies show that the overwhelming majority of even the most rural shippers are receiving trucking service at least as good as it was before reforms began.

Under the proposed trucking legislation, consumer protection in household goods carriers' operations would be transferred from the ICC to the Federal Trade Commission.

The legislation would also:

* Eliminate all remaining ICC regulation of trucking rates and carrier entry into the business.
* Eliminate antitrust immunity for collective ratemaking.
* Eliminate the "common carrier" obligation.
* Prevent states from imposing new regulations on operations that previously were regulated by the ICC.
* Eliminate all ICC truck leasing rules.
* Eliminate tariff publication requirements.

Initial partial deregulation of the trucking industry has been in place for five years. President Reagan called for further motor carrier deregulation in his State of the Union message last January.

At the same time she sent the trucking legislation to Congress, the Secretary forwarded legislation proposing

to eliminate all Interstate Commerce Commission regulation of the surface freight forwarder industry and on domestic water carriers.

The freight forwarder bill is similar to the trucking proposal. It would remove ICC jurisdiction and would eliminate antitrust immunity for the freight forwarders.

The water carrier legislation proposes to eliminate all ICC jurisdiction over domestic water carriers—barges, intercoastal and Great Lakes carriers. Because of exemptions in these areas, the ICC currently regulates less than ten percent of water carriage.

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

Sep. 12, 1985

The Honorable George Bush
President of the Senate
Washington, D.C. 20510

IDENTICAL LETTER TO:
The Honorable Thomas
P. O'Neill, Jr.
Speaker of the House of
Representatives
Washington, D.C. 20515

Dear Mr. President:

Economic regulation of the transportation industries began some ninety-eight years ago. While this regulation may have served the national interest well for a long time, much of it has now become an expensive paper chase with no offsetting benefits to consumers. It is now time to eliminate those elements of economic regulation which no longer provide any benefits to shippers or consumers. To accomplish this purpose I am transmitting three bills:

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes";

"To amend subtitle IV of title 49, United States Code, to reduce regulation of surface freight forwarders and brokers, and for other purposes"; and

"To amend subtitle IV of title 49, United States Code, to reduce regulation of interstate water carriers, and for other purposes."

These bills, entitled, respectively, the Trucking Deregulation Act of 1985, the Surface Freight Forwarder Deregulation Act of 1985, and the Interstate Water Carrier Deregulation Act of 1985, eliminate Interstate Commerce Commission regulation of those industries. The three bills are designed to build on the regulatory reforms effected in recent years through administrative changes made by the Interstate Commerce Commission (ICC), and through the legislative reforms provided by the Motor Carrier Act of 1980 and the Household Goods Transportation Act of 1980.

In the case of *motor carriers of property*, these reforms have worked extremely well. They have removed a considerable regulatory burden on the trucking industry, permitting carriers to increase the efficiency of their operations and to respond more rapidly and effectively to changing market conditions. These companies now compete relatively freely with each other because of liberal entry and operating restriction removal procedures. There is a more competitive environment, with more service and rate options for shippers, in many cases even for small shipments. The great majority of shippers believe the reforms have been advantageous to them. In sharp contrast to the arguments of opponents of reform that service to small communities would suffer, numerous studies show that the overwhelming majority of rural

small town shippers are getting service at least as good as before the reforms.

These reforms comprised a good first step in the right direction. It is now time to take the necessary final steps to complete deregulation of the trucking industry.

The bill builds on the evidence and recommendations of the Motor Carrier Ratemaking Study Commission, by eliminating the antitrust immunity now enjoyed by the trucking industry. The evidence compiled shows clearly that such immunity has raised rates unnecessarily and has not prevented undue discrimination.

The entry and rate regulation of the trucking industry that currently remains is unneeded and undesirable because there is ample competition within the trucking industry as well as competition from other modes. Such regulation suppresses managerial initiative and innovation, and wastes valuable taxpayer dollars and resources that the trucking industry could employ more usefully in improving its productivity.

Freight forwarders and *brokers* are intermediaries who arrange transportation for others. There is no justification for the continued regulation of either brokers or freight forwarders, as there is ample competition not only among and between them, but also competition from trucking companies and unregulated shipper associations.

Interstate water carriers have nominally been regulated by the Interstate Commerce Commission since the Transportation Act of 1940. However, as a result of numerous exemptions, ICC water carrier regulation applies to less than ten percent of interstate water transportation. The ICC-regulated intercoastal, inland waterways and Great Lakes transportation markets have no public utility basis for regulation, as numerous water carrier competitors exist, entry is easy, and investment requirements are relatively modest. Thus, the continued regulation of domestic water carriers is unneeded.

The Office of Management and Budget has advised that enactment of this proposed legislation would be in accord with the President's Program.

Sincerely,

/s/ Elizabeth
ELIZABETH HANFORD DOLE

13 Enclosures

4 Summaries
3 Charts
3 Bills
3 Sectional Analyses

Enclosure 1

SUMMARY OF DOT DEREGULATION LEGISLATION

The *trucking* bill would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff publication requirements;
- eliminate the "common carrier obligation";
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on operations that previously were regulated by the ICC; but
- not change current statutory provisions requiring DOT to set financial responsibility requirements.

The *freight forwarder* bill is similar to the trucking proposal. It would remove ICC jurisdiction over freight forwarders and would eliminate their antitrust immunity. It would also remove express and sleeping car service (such service no longer exists) and transportation brokers (who compete with freight forwarders) from ICC jurisdiction, and eliminate the restriction against forwarders acquiring control over motor carriers.

The *domestic water carrier* bill would eliminate ICC jurisdiction over all water carriage (barges, Great Lakes, and intercoastal shiping (sic)). Because of extensive exemptions, the ICC currently regulates less than ten percent of water carriage.

Each bill would become effective July 1, 1986.

Enclosure 2

SUMMARY OF DOT TRUCKING DEREGULATION LEGISLATION

The *trucking* bill would eliminate all remaining ICC regulation of the truck industry. It would:

- eliminate all remaining ICC regulation of trucking rates and entry;
- *not* change current statutory safety provisions and those requiring DOT to set financial responsibility requirements;
- eliminate antitrust immunity for collective ratemaking;
- eliminate tariff filing and publication requirements;
- eliminate the "common carrier obligation";
- eliminate all ICC truck leasing rules;
- transfer jurisdiction for consumer protection in household goods carriers' operations to the Federal Trade Commission;
- eliminate special antitrust immunity for household goods van line-agent relationships after three years;
- prevent states from "encroaching"—imposing new regulations on trucking operations that previously were regulated by the ICC; and
- become effective July 1, 1986.

Comparison of Draft Motor Carrier Legislation With Current Statute

[Excerpt]

	Current Statute	Draft Motor Carrier Legislation
CHAPTER 107: RATES AND TARIFFS		
Antitrust Immunity	Immunity for joint-line rates, general rate increases, collective classification; single-line immunity was removed on July 1, 1984	Remove all immunity
Tariffs		
Requirements to Make Tariffs Available	ICC recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Requirement to File Tariffs With ICC	Icc recently exempted contract carriers from requirement, but it remains a statutory requirement for common carriers	Remove requirement
Maximum/Minimum Rate Jurisdiction by ICC	Yes	Remove jurisdiction
Nondiscrimination Jurisdiction by ICC	Yes	Remove jurisdiction (would still be subject in part to antitrust statutes)
Zone of Ratemaking Freedom	Yes (but rarely used)	Remove

* * * *

Enclosure 8

A BILL

[Excerpt]

"To amend subtitle IV of title 49, United States Code, to reduce regulation of motor carriers of property, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Trucking Deregulation Act of 1985."

PURPOSE OF THE ACT

Sec. 2. This Act is a part of the continuing effort by Congress to reduce unnecessary and burdensome government regulations and to insure the competitiveness and efficiency of motor carrier transportation in the United States. It is intended to further amend the Interstate Commerce Act, as amended through the Motor Carrier Safety Act of 1984.

CONGRESSIONAL FINDINGS

Sec. 3. (a) The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the present and future; that, historically, the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities, small businesses, and others to enter the trucking industry; that protective regulation has resulted in operating inefficiencies and anticompetitive pricing, has tended to suppress technological and managerial innovation, and has tended to restrict the range of price and service

options available to shippers; that available evidence suggests that significant competitive and consumer benefits have been associated with the partial deregulation of the Motor Carrier Act of 1980 and that the remaining regulations are unnecessary and impose costs on society; that commercial laws have general applicability and are more appropriate for meeting desirable goals than specific regulations; that adequate protection for shippers and consumers can be provided by shifting certain functions to other agencies or by applying the antitrust laws; that in order to reduce the uncertainty felt by the Nation's transportation industries, many of the Interstate Commerce Commission's remaining responsibilities for the regulation of motor carrier transportation should be legislatively, rather than administratively, reduced and the Commission should be given well-defined parameters within which it may exercise its remaining jurisdiction, subject to Congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption consistent with achieving the reforms enacted.

(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 3 years following the effective date of enactment of this Act, to ensure that this Act is being implemented according to Congressional intent and purpose.

GENERAL PROVISIONS

Sec. 4. Section 10101 of title 49, United States Code, is amended

(a) in subsection (a) (2) by inserting "of passengers" after "motor carrier";

(b) in subsection (a)(2)(A) by striking "shippers, receivers,";

(c) in subsection (a)(2)(B) by striking "shipping and";

(d) in subsection (a)(2)(E) by striking "and small shippers";

(e) in subsection (a)(2)(H) by striking "and" after the semicolon;

(f) by striking subsection (a)(2)(I) and the connector "and" at the end thereof;

(g) in subsection (a)(3)

(1) by striking "(3) in regulating transportation by motor carrier of passengers";

(2) by striking "(A) to" and inserting "(I)" in lieu thereof;

(3) by striking "(B) to" and inserting "(J)" in lieu thereof; and

(4) by striking "(C) to" and inserting "(K)" in lieu thereof.

Sec. 5. Section 10102 of title 49, United States Code, is amended—

(a) in paragraph (9)(C)

(1) by inserting "a motor carrier of property or" after "transportation"; and

(2) by striking ", II," after "subchapter I";

(b) in paragraph (11) by striking "and such other similar property as the Commission may provide by regulation" each time it appears; and

(c) in paragraph (12) by adding the following new sentences at the end thereof:

"'Motor carrier' is further defined as meaning a motor carrier of passengers and does not include a motor carrier of property unless otherwise specifically stated. This further definition is not applicable to the definition of motor carrier as used in other subtities or titles of the U.S. Code."

INTERSTATE COMMERCE COMMISSION ADMINISTRATION

Sec. 6. Section 10322 of title 49, United States Code, is amended—

(a) in subsection (a)

(1) by striking ", or section 10934" at the end of the first sentence;

(2) by striking "10530," in the second sentence;

(3) by striking "10922(i)(2), 10922(i)(4)" in the second sentence and inserting "10922(h)(2)" in lieu thereof;

(4) by striking "10934(c)," in the second sentence; and

(5) by striking "10922(c)(2)(A)" in the third sentence and inserting "10922(b)(2)(A)" in lieu thereof;

(b) in subsection (b)(1) by striking "Except as provided in paragraph (2) of this subsection, a" and inserting "A" in lieu thereof;

(c) by striking subsection (b)(2); and

(d) by redesignating subsection (b)(3) as subsection (b)(2).

JURISDICTION

Sec. 7. Section 10521 of title 49, United States Code, is amended—

inadequate to the task of ensuring compliance with rate bureau procedures. As this Court held in *ATA*, "Congress envisioned that the Commission—and not the threat of antitrust liability—would be the primary enforcer of [rate bureau] guidelines." *Id.* at 2466-67. If the Government now believes that the panoply of shipper remedies available under the ICA, in light of *ATA*, is insufficient, it has recourse to Congress to urge the creation of treble damage sanctions for rate bureau violations.

* * *

In sum, *Keogh* is settled law, which for 60 years has ensured that both carriers and shippers could rely on the Interstate Commerce Act for the resolution of damage disputes implicating regulated rates. If there are to be policy-driven changes in that law, then those changes should be made by the political branches that have the governmental capacity to harmonize the interests and equities at stake.

Respectfully submitted,

BRYCE REA, JR.
DONALD E. CROSS
REA, CROSS & AUCHINCLOSS
1 Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

SANFORD M. LITVACK
DONOVAN, LEISURE, NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Attorneys for Respondent Niagara Frontier Tariff Bureau, Inc.

DONALD L. FLEXNER *
WM. RANDOLPH SMITH
CLIFTON S. ELGARTEN
PETER K. LEVINE
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5800

Attorneys for Respondent Dominion-Consolidated Truck Lines Ltd.

LESTER M. BRIDGEMAN
LOUIS E. EMERY
BRIDGEMAN & URBANCZYK
1112 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 429-9223

Attorneys for Respondent Inter-City Truck Lines (CANADA), Inc.

PETER D. STANDISH
JOEL B. HARRIS
PHILIP A. BYLER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Respondent TNT Canada, Inc.

PETER A. GREENE
CHARLES L. FREED
THOMPSON, HINE AND FLORY
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Attorneys for Respondent ICL International Carriers, Ltd.

JOHN W. BRYANT
EAMES, WILCOX, MASTEJ & BRYANT
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750

Attorneys for Respondent Bondy Cartage, Ltd.

* Counsel of Record

August 14, 1985

APPENDIX

APPENDIX

Communications To Congress By The Department of Justice, The Department of Transportation, and The Interstate Commerce Commission Regarding Recent Amendments To The Interstate Commerce Act

A. Railroad Revitalization and Regulatory Reform Act of 1976.

1. *Hearings on S. 793, S. 863, S. 1143, S. 1217, S. 1385, S. 1396, S. 1476, S. 1679, S. 1770, S. 1801, S. 1876, S. 1879, S. 1898, S. 1946, and S. 2027 Before the Comm. on Commerce, United States Senate*, 94th Cong., 1st Sess. 619, 658, 689, 692, 701 (1975).

2. *Railroad Accounting, Materials Availability, and Transportation Statistics, Hearings on H.R. 7778 and Section 8 of H.R. 7681 Before the Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 94th Cong., 1st Sess. 13, 69 (1975).

3. H.R. Rep. No. 725, 94th Cong., 1st Sess. 224, 279 (1975).

4. S. Rep. No. 499, 94th Cong., 1st Sess. 314 (1975).

B. Motor Carrier Act of 1980.

1. *Regulation of Carriers Subject to the Interstate Commerce Act, Hearings on H.R. 10909, H.R. 12084, H.R. 12793, H.R. 11664, H.R. 12386, H.R. 15438, H.R. 15439, H.R. 15440, H.R. 15442, H.R. 15443, H.R. 15444, H.R. 980, H.R. 986, H.R. 10473, H.R. 12491, H.R. 15271, H.R. 13353, H.R. 7503, H.R. 1080; and S. 3308 Before the Subcomm. on Surface Transportation of the Comm.*

on Public Works and Transportation, House of Representatives, 94th Cong., 2d Sess. 99, 126, 151, 236 (1976).

2. *Regulatory Problems of the Independent Owner-Operator in the Nation's Trucking Industry (Part 3), Hearings Before the Subcomm. on Special Small Business Problems of the Comm. on Small Business, House of Representatives*, 95th Cong., 1st Sess. 161 (1977).

3. *Oversight of Freight Rate Competition in the Motor Carrier Industry, Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, United States Senate*, 95th Cong., 1st and 2d Sess., Volume 1, at 4, 46 (1978).

4. *Oversight of Freight Rate Competition in the Motor Carrier Industry, Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, United States Senate*, 95th Cong., 2d Sess., Volume 2, at 836 (1978).

5. *Economic Regulation of the Trucking Industry, Hearing Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 1, at 30 (1979).

6. *Economic Regulation of the Trucking Industry, Hearings on S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 2, at 428, 585, 627 (1979).

7. *Truck Safety Act, Hearings on S. 1390 and S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess. 70, 100, 116, 118 (1979).

8. *Economic Regulation of the Trucking Industry, Hearings on S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 3, at 826, 844, 863, 1003 (1979).

9. *Economic Regulation of the Trucking Industry, Hearings on S. 1400 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 4, at 1264, 1323, 1335, 1336, 1349 (1979).

10. *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of its Regulations, Part 3, Hearings on H.R. 6418 Before the Subcomm. on Surface Transportation of the Comm. on Public Works and Transportation, House of Representatives*, 96th Cong., 2d Sess. 191, 935, 1117 (1980).

11. *Economic Regulation of the Trucking Industry, Hearings on S. 2245 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 2d Sess., Part 5, at 1499, 1578, 1611, 1876, 1927 (1980).

12. *Customer Pickup Proposals and Their Impact on Small Business and the Robinson-Patman Act, Hearings Before the Select Comm. on Small Business, United States Senate*, 96th Cong., 2d Sess. 208 (1980).

C. Household Goods Transportation Act of 1979.

1. *Hearings on S. 1798 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess. 4, 316, 412 (1979).

D. Staggers Rail Act of 1980.

1. *Implementation of the 4R Act, Hearings Before the Subcomm. on Surface Transportation of the*

Comm. on Commerce, Science, and Transportation, United States Senate, 96th Cong., 1st Sess. 4, 10, 45, 69 (1979).

2. 125 Cong. Rec. 6436 (1979).

3. 126 Cong. Rec. 17787, 24032, 24329, 24824, 24839, 27899 (1980).

4. *Coal Rates and Federal Railroad Regulation: Oversight of the Railroad Revitalization and Regulatory Reform Act of 1976, Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. 74, 102, 126, 468, 524, 763, 788, 799 (1979).

5. *Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. 87, 135, 420, 359, 929, 959, 1014 (1979).

6. *Railroad Deregulation Act of 1979, Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 1, at 61, 250, 283 (1979).

7. *S. 796, Railroad Deregulation Act of 1979, Hearing on S. 796 Before the Subcomm. on Government Regulation and Paperwork of the Select Comm. on Small Business, United States Senate*, 96th Cong., 1st Sess. 3 (1979).

8. *Railroad Deregulation Act of 1979, Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 2, at 543 (1979).

9. *Railroad Mergers, Hearing Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Comm. on the Judiciary, United States Senate*, 96th Cong., 1st Sess. 18, 45, 60 (1979).

10. *Railroad Deregulation Act of 1979, Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 3, at 904 (1979).

11. *Railroad Deregulation Act of 1979, Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 4, at 1315, 1330, 1335, 1341, 1342 (1979).

12. *The Impact of Rail Coal Shipping Rate Increases, Hearings Before the Joint Economic Comm., Congress of the United States*, 96th Cong., 1st Sess. 19 (1979).

13. *Rural Transportation Problems as They Relate to Agriculture, Hearings Before the Subcomm. on Agricultural Product, Marketing, and Stabilization of Prices of the Comm. on Agriculture, Nutrition, and Forestry, United States Senate*, 96th Cong., 1st Sess., Part II, at 3, 13, 37 (1979).

14. *ICC Ratemaking in Noncompetitive Markets—Oversight, Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 2d Sess. 2 (1980).

15. *Increased Coal Rates on the Louisville & Nashville Railroad, Hearing Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United*

States Senate, 96th Cong., 1st Sess. 2, 34, 52, 86, 107 (1979).

16. *Rail Deregulation: Market Dominance, Contract Rates and Exemptions, Joint Hearing on H.R. 4570 Before the Subcomm. on Economic Growth and Stabilization of the Joint Economic Comm. and the Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce, U.S. House of Representatives*, 96th Cong., 1st Sess. 91 (1979).

17. *Coal Rates and Federal Railroad Regulation: Oversight of the Railroad Revitalization and Regulatory Reform Act of 1976, Supplemental Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. 49, 52, 66 (1979).

18. *Railroad Transportation Policy Act of 1979, Hearings on S. 1946 Before the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 1st Sess., Part 1, at 746 (1979).

19. *Railroad Transportation Policy Act of 1979, Hearings on S. 1946 Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United States Senate*, 96th Cong., 2d Sess., Part 2, at 767 (1980).

20. *Rail Act of 1980, Hearings Before the Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 2d Sess. 1, 257 (1980).

21. *USRA-Nomination; Authorization; Conrail Plant Rationalization; and Employee Protection Pro-*

gram, Hearing on S. 2527 and S. 2530 Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United States Senate, 96th Cong., 2d Sess. 50, 53 (1980).

22. H.R. Rep. No. 1430, 96th Cong., 2d Sess. 144 (1980).

E. Bus Regulatory Reform Act of 1982.

1. *Deregulation of the Intercity Bus Industry, Hearing on H.R. 3663 Before the Subcomm. on Surface Transportation of the Comm. on Commerce, Science, and Transportation, United States Senate*, 97th Cong., 2d Sess., 57, 74, 136, 153 (1982).

2. *Bus Regulatory Reform, Hearings on H.R. 3662 and H.R. 3663 Before the Subcomm. on Surface Transportation of the Comm. on Public Works and Transportation, House of Representatives*, 97th Cong., 1st Sess. 66, 73 (1981).

3. 128 Cong. Rec. S7718 (daily ed. June 30, 1982) (statement of Sen. Danforth).